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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF CLERK U.S. DISTRICT COURT
HABEAS CORPUS BY A PERSON IN STATE CUSTODY WESTERN DISTRICT OF WASHINGTON AT TACOMA
DEPUTY

| | |
|--|--|
| United States District Court | District WESTERN WASHINGTON |
| Name (under which you were convicted): Mr. Darnell McGary | Docket or Case No.: COP-5751-BHS/KBS |
| Place of Confinement: Special Commitment Center | Prisoner No.: 490070 |
| Petitioner (include the name under which you were convicted) v. Mr. Darnell McGary | Respondent (authorized person having custody of petitioner) Dr. Henry Richards |
| The Attorney General of the State of Mr. Rob McKenna, Washington | |

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: **Pierce County Superior Court**

- (b) Criminal docket or case number (if you know): **00-2-14060-1**
2. (a) Date of the judgment of conviction (if you know): **February 5, 2004**
(b) Date of sentencing: **same**
3. Length of sentence: **Indefinite/ Open-ended**
4. In this case, were you convicted on more than one count or of more than one crime? Yes No
5. Identify all crimes of which you were convicted and sentenced in this case: **Civil Commitment as a sexually violent predator, Predicate Offenses are as follows: 88-01612-9, 88-1-01885-7, 88-1-01277-8**

6. (a) What was your plea? (Check one)
(1) Not guilty (3) Nolo contendere (no contest)
(2) Guilty (4) Insanity plea



09-CV-05156-PET

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Stipulation to being a sexually violent predator, with Anti-Social Personality disorder

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: Court of Appeals, Division III

(b) Docket or case number (if you know): 31487-8-II

(c) Result: Conviction Upheld on: Lack of recent overt act/breach

(d) Date of result (if you know): In re Detention of McGary 128 Wn. App (2005)

(e) Citation to the case (if you know): Same

(f) Grounds raised: Breach of Plea/Failure to Plead and Prove Recent Overt Act under RCW 71.09.060(3); and In re Detention of Gordon 912 Wn. App. (2000)

(g) Did you seek further review by a higher state court? Yes No

If yes, answer the following:

(1) Name of court: State Supreme Court

(2) Docket or case number (if you know): Unknown

(3) Result: Review Denied

(4) Date of result (if you know): Unknown

(5) Citation to the case (if you know): In re McGary 156 Wn. 2d (2006)

(6) Grounds raised: same

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Peirce County Superior Court

(2) Docket or case number (if you know): 06-2-10823-5

(3) Date of filing (if you know): November 29, 2006

(4) Nature of the proceeding: Petition for Writ of Habeas Corpus

(5) Grounds raised: Equal Protection, Criminal Mistreatment, Violation of RCW 71.09.060(3), In re Detention of Gordon, and In re Detention of Anderson, further RCW 71.09 et seq. is unconstitutional based on In re McGary 128 Wn.2d (2005)

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: Denied

(8) Date of result (if you know): Unknown

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: State Supreme Court of Washington

(2) Docket or case number (if you know): 82357-0

(3) Date of filing (if you know): Unknown

(4) Nature of the proceeding: Personal Restraint Petition

(5) Grounds raised: State of Washington brought two consecutive petitions against petitioner in violation of the Double Jeopardy, and Expost Facto Provisions. RCW 71.09 is based on predicate offenses

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result:

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(c) Date of result (if you know): _____

Did you appeal to the highest state court having jurisdiction over the action taken on your petition?

(1) The author is the first person to have made a substantial contribution to the creation of the work.

(1) First petition: Yes No

(2) Second petition: Yes No

(3) Third petition: Yes No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Petitioner claims Double Jeopardy after the State filed two petitions, the latter being after I was dismissed and released to WSH

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

Petitioner was at Western State Hospital, a none total confinement facility, when the second petition was filed. And had registered, had community outing, and was on a unsecure ground, were he could come without security devices such as GPS system. Further, the facility was co-ed, and Petitioner had unsupervised contact with female patients. when the state filed it's second petition it did so unlawful, and against RCW 71.09.060(3)

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective Assistance of Counsel, On part of trial court lawyers

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO: The states petition is based on predicate offenses, and the Ninth Circuit has denounced the use of predicate offenses

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

The Ninth Circuit ruled that if the petition is based on predicate offenses it must resolve the issue.

(b) If you did not exhaust your state remedies on Ground Two, explain why: Yes, as explained
all issues are exhausted up to the State Supreme Court

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Personal Restraint Petition

Name and location of the court where the motion or petition was filed: Court of Appeals,
Division II

Docket or case number (if you know): 35911-1-II

Date of the court's decision: Same as mentioned

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Same as mentioned

Docket or case number (if you know): Same as mentioned

Date of the court's decision: October 17, 2007

Result (attach a copy of the court's opinion or order, if available): Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE: Ineffective Assistance of Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The underlying petition is defective, probable cause information supports, erroneous information, leading experts say APD is not enough to sustain commitment.

(b) If you did not exhaust your state remedies on Ground Three, explain why: Same as mentioned

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Same

Name and location of the court where the motion or petition was filed: Court of Appeals
Division II

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

GROUND FOUR: The state continues to confine Petitioner unlawfully as total confinement relies on whether or not your in a secure facility

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

The State Supreme Court decided that in order for a petition to be filed the person has to be in total confinement serving time for a sex offense

RCW 71.09.025, 71.09.030

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

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Date of the court's decision:

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing Steve Stern, F. McNamara Jardine

(b) At arraignment and plea: same

(c) At trial: same

(d) At sentencing: same

(e) On appeal: Peter Tiller

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner is unlawfully restrained, and in Double Jeopardy due to ineffective assistance of counsel, being retained in a total confinement facility after being in a unsecure facility at Western State Hospital the state went against it's own law to confine petitioner, against RCW 71.09.060(3) and In re Detention of Gordon 102 Wn.App (2000). See Schlup v. Delo 513 US (1995)

* The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

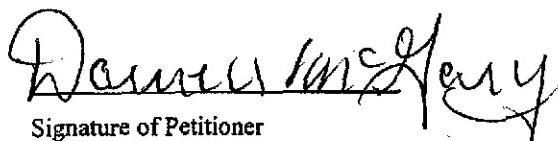
Therefore, petitioner asks that the Court grant the following relief: Vacate the petition de-
clarining petitioner a sexually violent predator under
the grounds declared in his briefing, and enter judgment
or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 3-18-2009

(month, date, year).

Executed (signed) on 3-17-09 (date).


Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

* * * *